STATE OF MICHIGAN

IN THE COURT OF CLAIMS

2019 AUG 15 PM 3:02

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, by and through its Water and Sewerage Department, AND CITY OF LIVONIA,

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

Honorable Christopher M. Murray

Case 2018-000259-MZ

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PLAINTIFFS' 08/15/2019 MOTION FOR RECONSIDERATION OF THE COURT'S 07/26/2019 ORDER GRANTING DEFENDANT MDEQ'S 02/01/2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

Plaintiffs Oakland County Water Resources Commissioner ("OCWRC"), the Great Lakes Water Authority ("GLWA"), the City of Detroit (by and through its Water and Sewerage Department) ("DWSD"), and the City of Livonia ("Livonia") (OCWRC, GLWA, DWSD and Livonia, collectively "Plaintiffs") for their August 15, 2019 Motion for Reconsideration of the Court's July 26, 2019 Order granting Defendant Michigan Department of Environmental Quality's ("MDEQ") February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) state as follows:

1. MDEQ filed a Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) on February 1, 2019 ("Motion for Summary Disposition").

2. Following oral argument on July 23, 2019, the Court issued an Opinion and Order on July 26, 2019 granting MDEQ's Motion for Summary Disposition. (July 26, 2019 Opinion and Order attached as **Exhibit 1**).

3. Plaintiffs now move this Court to reconsider the July 26, 2019 Order pursuant to Court of Claims Local Rule 2.119(F)[1] because the Court's granting of summary disposition constituted palpable error.

4. The factual basis and legal support for this Motion is set forth in Plaintiffs' Brief in Support filed contemporaneously with this Motion.

WHEREFORE, Plaintiffs respectfully request that this honorable Court grant their August 15, 2019 Motion for Reconsideration of the Court's July 26, 2019 Order granting Defendant

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[1] Court of Claims Local Rule 2.119(F) mirrors MCR 2.119(F).

MDEQ's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and grant Plaintiffs any other relief that the Court deems appropriate.

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Dated: August 15, 2019

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BRIEF IN SUPPORT OF PLAINTIFFS' 08/15/2019 MOTION FOR RECONSIDERATION OF THE COURT'S 07/26/2019 ORDER GRANTING DEFENDANT MDEQ'S 02/01/2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

I. INTRODUCTION

Following the Michigan Department of Environmental Quality's ("MDEQ") enactment of the Revised Lead and Copper Rules on June 14, 2018, Plaintiffs Oakland County Water Resources Commissioner ("OCWRC"), Great Lakes Water Authority ("GLWA"), the City of Detroit ("Detroit"), and the City of Livonia ("Livonia") (all collectively referred to as "Plaintiffs"), filed suit challenging the validity of the Rules as, among other things, procedurally invalid. (See Complaint, Count I). In response, MDEQ filed a February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). ("Motion for Summary Disposition"). Before oral argument on MDEQ's Motion for Summary Disposition, on May 28, 2019, Plaintiffs filed a Motion for Leave to Amend Complaint to Include a Headlee Amendment Unfunded Mandate Claim ("Motion to Amend"). Oral argument with respect to the two motions was held on July 23, 2019, during which the Court granted Plaintiffs' Motion to Amend. Subsequently, the Court issued a July 26, 2019 Opinion and Order granting MDEQ's Motion for Summary Disposition with respect to Plaintiffs' Counts I-V. **(Ex 1)**.

Plaintiffs now seek to demonstrate that several aspects of this Court's July 26, 2019 Opinion and Order constitute palpable error, and, therefore, they are entitled to reconsideration of the Court's Order. Namely, this Court did not address the allegations in Plaintiffs' First Amended Verified Complaint regarding the deficient RIS and MDEQ's removal of the 5 ppb threshold before resubmitting the Rules for approval from the Joint Committee on Administrative Rules ("JCAR"). In addition, because MDEQ violated the very provision of the APA upon which its

Motion for Summary Disposition was granted (specifically, MCL 24.245c(5)), MDEQ is not entitled to summary disposition regarding Plaintiffs' claims of procedural invalidity (Count I).

In essence, reconsideration should be granted for the following two reasons:

1. This Court ruled that the legislative amendments enacting MCL 24.245c legislatively overruled *Michigan Charitable Gaming Ass'n v. Michigan*, 310 Mich App 584 (2015). MCL 24.245c did not, and, in fact, codified and strengthened the protections against the ruling making process by adding requirements for Office of Regulatory Reinvention ("ORR") determination as to whether an amended rule increased the regulatory burden before a revised rule could be submitted to Joint Committee on Administrative Rules ("JCAR").

2. This Court ruled that there was no Administrative Procedures Act, 1969 PA 306 as amended ("APA") violation, specifically of MCL 24.245c. The record before the Court demonstrates that MCL 24.245c was violated because the Supplemental Agency Report, Section 6 (where the ORR determination of whether the regulatory impact of the revised rule must be reflected) is completely blank (see **Exhibit 2**) and there is no evidence this statutorily required determination was ever made or even communicated to JCAR.

The correction of these palpable errors results in a different disposition of MDEQ's Motion for Summary Disposition. Thus, Plaintiffs are entitled to reconsideration of this Court's July 26, 2019 Order.

II. FACTUAL BACKGROUND

In order to quell public criticism following the Flint Water Crisis, MDEQ set forth to enact its own lead and copper regulation ("Rules")[2] and in March of 2017, MDEQ submitted a Request for Rulemaking to the ORR for purposes of amending the lead and copper provisions of the state's existing Supplying Water to the Public Rules. In November of 2017, during the initial stages of the rulemaking process, MDEQ issued a rules summary confirming that the proposed Rules would require all privately owned Lead Service Lines ("LSL") to be removed and replaced in 20 years, with the cost borne by the water suppliers.

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[2] For purposes of this Motion and Brief, any reference to the term "Rules" refers to Michigan Administrative Rules 325.10604f(6), Rule 325.10401a, Rule 325.11604(c) and Rule 325.10410(7).

In December 2017, MDEQ acknowledged that the cost of the proposed Rules, which importantly required the replacement of all LSLs without a 5 ppb threshold, would likely exceed $2.5 Billion. (See Internal MDEQ E-mails, **Exhibit 3**).[3] Pursuant to MCL 24.245(3), MDEQ prepared an internal Regulatory Impact Statement and Cost-Benefit Analysis ("RIS") for the Rules in December of 2017, further confirming MDEQ's belief that the cost of the Rules would be $2.5 Billion over 20 years. (2017 Draft RIS, **Exhibit 4**). By MDEQ's own admission, "it's expensive!" (*See* 12/14/2017 LaChance E-mail, **Ex 2**).

With a pressing timeline and cost being a pinnacle concern, MDEQ circulated a draft RIS in January 2018 in which it had "brought down [the cost] to $499 Million." (01/09/2018 Oswald E-mail, **Ex 3**). MDEQ then published this updated RIS, indicating that the cost of implementing the Rules would be $499 Million, largely due to a change in the Rules to include the 5 ppb threshold with respect to the mandated removal of LSLs. (Published RIS, **Exhibit 5**).[4] MDEQ's own internal e-mails confirm that the only possible way it was able to reduce this potential cost from $2.5 Billion to $499 Million was by including the 5 ppb threshold. (01/09/2018 Oswald E-mail, **Ex 3**). MDEQ then promptly published a draft of the Rules in which R 325.10604f contained the 5 ppb threshold, in accordance with the Published RIS. (February 2018 Rules, **Exhibit 6**). The 5 ppb threshold did **not** reflect and was inconsistent with the MDEQ's stated goal of having all LSLs removed and replaced in 20 years.

Following the public comment period, MDEQ sought permission from JCAR to withdraw the February 2018 Rules for the purpose of making additional changes before resubmission. (See

[3] These e-mails, and additional exhibits attached were obtained via FOIA request.

[4] MDEQ specifically stated, "[t]he largest source of the costs to all water supplies regulated by this rule will be the requirement to compete an inventory of all distribution system materials (water main, service lines, etc.) and remove LSLs when lead levels exceed a 5 ppb threshold." **(Ex 5)**

JCAR's Approval of Rule Withdrawal, **Exhibit 7**). Among the changes made during the withdrawal period, was the removal of the 5 ppb threshold from R 325.10604f, crucial to the reduced cost estimate of $499 Million and without which, the estimated cost of the proposed Rules would be $2.5 Billion. (See May 2018 Rules, **Exhibit 8**). MDEQ then submitted a new draft of the Rules to the Office of Regulatory Reinvention ("ORR") on May 8, 2019, including the proposed changes, as required by MCL 24.245c. (See **Ex 8**; see also Howes May 9, 2018 E-mail, **Exhibit 9**).

ORR then submitted the May 2018 Rules, without the 5 ppb threshold, to JCAR for final comment only an hour and ten minutes after receiving them from MDEQ and without making the required determination as to whether the [revised] Rules imposed an increased regulatory burden. (See MCL 24.245c; O'Berry May 9, 2018 E-mail, **Exhibit 10**; ORR's May 9, 2018 Submission Package to JCAR, **Exhibit 11**). Notably, ORR's May 9, 2018 Submission Package to JCAR, through which it provided JCAR with the May 2018 Rules, contained a Supplemental Agency Report as required by MCL 24.245c *missing* any indication of ORR's required determination with respect to the regulatory impact of the proposed Rules without the 5 ppb threshold. (See Supplemental Agency Report, Exhibit M to MDEQ's Motion for Summary Disposition; see also **Ex 11**). In short, absent from any record evidence is any determination with respect to whether the removal of the 5 ppb threshold would increase the regulatory impact of the Rules, even though, by MDEQ's own admission, the inclusion of this threshold was the only way it could justify reducing the cost of implementing the Rules from $2.5 Billion to $499 Million. MDEQ's actions reflect a failure of accountability and a dubious effort to bypass the "protections" offered by the APA; they directly violate the express provisions of MCL 24.245c.

III. LAW AND ARGUMENT

A. Standard of Review

Plaintiffs' Motion for Reconsideration is brought pursuant to Court of Claims Local Rule 2.119(F).[5] Under Local Rule 2.119(F)(3), a court has "considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). A court may revisit issues it previously decided and grant a motion for reconsideration even if presented with a motion that offers nothing new to the court. *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). Under Local Rule 2.119(F)(3), the party moving for reconsideration must demonstrate a "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error." *Sanders v McLaren-Macomb*, 323 Mich App 245, 264; 916 NW2d 305 (2018).

B. Argument

1) The Court committed a palpable error by failing to consider MDEQ's lack of adherence to MCL 24.245c and *Charitable Gaming* with respect to its July 29, 2019 Order granting MDEQ's Motion for Summary Disposition

In this Court's July 29, 2019 Opinion, the Court noted:

> At oral argument (but not in their response brief) plaintiffs stressed that *Michigan Charitable Gaming* controls on their APA argument, as that Court stated that there is no "temporal limit" on the ability to change a rule submitted to JCAR, "so long as those changes are consistent with the impact statements that have already been submitted…." [*Michigan Charitable Gaming*, 310 Mich App 584, 602 (2015)]. That decision, however, does not support plaintiffs' argument. For one, the RIS addresses the final cost estimate of $499 Million. Additionally, the Legislature amended the APA after

[5] Pursuant to Local Rule 2.119(F)(2), on a motion for reconsideration, "[n]o response to the motion may be filed, and there is no oral argument, unless the court otherwise directs."

> *Michigan Charitable Gaming* to allow modifications to proposed rules without necessarily needing to alter an RIS. MCL 24.245c(4).

(**Ex 1**, p 8). The Court is entirely accurate in the quotation of *Charitable Gaming* as well as the observation that the Published RIS contains a cost estimate of $499 Million. The Court is similarly correct that MCL 24.245c(4) does not always require the completion of a new RIS. The application of these observations to the actual accounting of what occurred in this case as alleged by Plaintiffs, however, shows that the APA was violated and that an RIS reflecting the rule that was actually enacted was required. Consequently, palpable error exists in the Court's Opinion.

As observed in the Court's Opinion, *Charitable Gaming*, as well as MCL 24.245c, stand for the principle that, when proposed rules are withdrawn with the permission of JCAR, subsequently amended, and then resubmitted to JCAR, a new RIS and public hearing are required in certain circumstances. See *Charitable Gaming*, 310 Mich App at 602, see also MCL 24.245c(4). Namely, where the regulatory impact of the rules as changed is no longer consistent with the impact statements that have already been submitted. *Id.*

As the Court correctly observed, the Published RIS includes a $499 Million dollar estimate. (See **Ex 1**, p 8; see also **Ex 4**). Additionally, as identified above, and as admitted by MDEQ, it was able to achieve this $499 Million dollar estimate only by including a 5 ppb threshold within R 325.10604f. (12/14/2017 LaChance E-mail, **Ex 2**). After withdrawing the February 2018 Rules with the permission of JCAR, MDEQ removed this 5 ppb threshold with an admitted regulatory impact of $2 Billion and subsequently delivered the May 2018 Rules, incorporating the removal of that threshold, to ORR. (**Ex 7**; **Ex 8**).

At this point, **both** MCL 24.245c and *Charitable Gaming* mandate that a new RIS and new public hearing are required because the regulatory impact of the proposed rules, as changed, is more burdensome than the regulatory impact of the rules as previously drafted. *Charitable*

Gaming, 310 Mich App at 602, MCL 24.245c(4). As admitted by MDEQ, the May 2018 Rules, incorporating the removal of the 5 ppb threshold, are $2 Billion more burdensome than the February 2018 Rules, yet no additional RIS was issued and no public hearing was held. (01/09/2018 Oswald e-mail, **Ex 2, Ex 7**).

This fact alone states a viable claim for invalidity based upon a procedural violation of the APA; moreover, MCL 24.245c(5) requires:

> After receiving [ORR's] determination [with respect to the regulatory impact of the rule as changed], the agency shall submit a supplement to the agency report under section 45(2) that includes all of the following:
>
> (a) A statement of the determination of [ORR with respect to the regulatory impact of the rule as changed] and whether a new agency report under section 45(2) and public hearing are required.

MDEQ did issue a Supplemental Agency Report as required by MCL 24.245c, attached as Exhibit M to its Motion for Summary Disposition.[6] At first glance at the Supplemental Agency Report, however, one aspect is notably apparent: Section 6, indicating ORR's determination with respect to the regulatory impact of the rules, as changed, is blank. (Supplemental Agency Report within **Ex 11**). Accordingly, what can be gleaned from the factual record is that this determination was never made, and even more apparent, that JCAR never received notice of ORR's determination as is required by MCL 24.245(c)(5). If this determination had been made, it would have been apparent to ORR, or JCAR, or anyone involved in the rulemaking process, that the regulatory impact of the Rules without the 5 ppb threshold, is **$2 Billion greater** than the version of the Rules upon which the Published RIS was based. MDEQ for the first time raised its argument with respect to MCL 24.245c in response to Plaintiffs' Motion to Amend.

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[6] The Supplemental Agency Report is also included as Exhibit 2 to this Motion, and within Exhibit 11, ORR's May 9, 2018 Submission Package to JCAR.

All of these arguments and factual assertions relate directly to the allegations in Plaintiffs' First Amended Verified Complaint. (**Exhibit 12, ¶¶75-78, 108-110**). MDEQ did not measure up to the express provisions of the APA throughout the rulemaking process. Specifically, MDEQ violated the APA by not insuring that the Published RIS reflected the regulatory impact of the Rules and failing to insure a proper determination was made with respect to the regulatory impact of the Rules after they were withdrawn and amended. (**Ex 5**; **Ex 8**; Supplemental Agency Report, within **Ex 11**). Lastly, MDEQ violated an express provision of the APA by failing to include within the Supplemental Agency Report, a statement of ORR's determination with respect to the Rules as changed. MCL 24.245c(5); (see also **Ex 2**). These acts constitute cause for finding the Rules procedurally invalid under the APA and it was palpable error for this Court to grant MDEQ's Motion for Summary Disposition with respect to Plaintiffs' Count I.

2) MCL 24.245c did not legislatively overrule *Charitable Gaming*

MDEQ and this Court dismissed Plaintiffs' arguments with respect to the holding in *Charitable Gaming*, accepting that the passage of MCL 24.245c "legislatively overruled" the requirements of the court's opinion in that case. (MDEQ's 06/11/2019 Response in Opposition to Plaintiffs' 05/28/2019 Motion for Leave to Amend Complaint to Include Headlee Amendment Unfunded Mandate Claim, p 13; **Ex 1**, p 8). Upon closer examination, MCL 24.245c does not render *Charitable Gaming* inapplicable. It actually codifies the principle that an additional RIS and public hearing are required where a rule, as changed, results in a greater regulatory impact and the previous RIS no longer applies. MCL 24.245c actually adds additional protection to that provided by *Charitable Gaming* in regulatory ruling. Both are intended to prevent the rule making process which took place here, where an agency publishes a rule, issues an RIS based on that rule (with a lesser negative impact) and holds a hearing accordingly, then subsequently withdraws the

rule and makes drastic changes before re-submission (with a substantial (i.e. $2 Billion) increased regulatory impact).

It is undisputed that the sequence of events in this matter occurred as follows. MDEQ engaged in a Stakeholder process during which it shared drafts of the proposed Rules that required all LSLs to be removed in 20 years at the municipal suppliers' expense. The municipal Stakeholders offered data showing the cost of the rules would exceed $2.5 Billion. Not only did MDEQ **not** dispute this cost estimate, in December 2017 MDEQ prepared a draft RIS that identified the cost burden of the proposed rules to be $2.5 Billion. **This draft was not shared with Stakeholders**. Instead, when the Rules were published for public comment in February 2018, MDEQ included a RIS with an arbitrary cost estimate ($499 Million) based on a threshold (5 ppb) MDEQ fully intended to later remove **in order to achieve its goal of replacing all LSLs in 20 years – its stated purpose from the beginning.**

During the public comment period, municipal water suppliers included a detailed analysis that the real cost of removing all LSLs, as intended by MDEQ, would be over $2.5 Billion. MDEQ did not challenge, rebut, or reject this cost estimate. MDEQ did not change one word in its RIS cost estimate summary for the Rules; rather after the public comment period, MDEQ removed the 5 ppb threshold when it withdrew the Rules pursuant to MCL 24.245c - resulting in the passage of a final rule with much greater regulatory impact than initially represented during the comment period and depriving the public of an opportunity for meaningful comment on an accurate RIS.[7] This simply defies the entire framework of the public comment and rulemaking process as defined by the APA and, specifically, MCL 24.245c. Moreover, the process advocated by MDEQ does

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[7] With dismissal of the Plaintiffs' complaint, Plaintiffs have not even had an opportunity to receive and review the administrative record in this matter. The few records that are available do not document that JCAR was informed about the real cost of the Rules ($2.5 Billion) as required by the APA, and thus acted without relevant and complete information in reviewing the Rules. See MCL 24.245(2).

not promote credibility or accuracy in rulemaking and the RIS on which the public or JCAR expects to rely. Rather, the process allows an admitted $2 Billion inaccuracy. There is no way the Legislature or the APA meant for this to be allowed to happen, let alone promote this outcome.

This is the exact issue identified by the court in *Charitable Gaming*; and by passing MCL 24.245c, the Legislature did not intend to create the rulemaking loophole upon which MDEQ wishes to rely.[8] This Court's determination that MCL 24.245c supplants the *Charitable Gaming* decision and, therefore, excuses MDEQ's actions in this case, constitutes palpable error and thus requires reconsideration of this Court's Order of dismissal with respect to Plaintiffs' claim of procedural invalidity.

IV. CONCLUSION

Through MDEQ's interpretation of the APA's required procedure, it was able to pass amended Rules that created an additional $2 Billion in regulatory impact without public input or any determination in this regard. Not only does this action undermine the entire purpose of the APA's rulemaking procedure, in doing so, MDEQ violated the very statute upon which it relied to obtain summary disposition of Plaintiffs' claims, namely MCL 24.245c(5). By failing to take into consideration the crux of Plaintiffs' claims with respect to the RIS, and by granting MDEQ summary disposition based upon a statute which MDEQ itself violated, this Court committed palpable error in its July 29, 2019 Order. Correction of this error lends itself to a different result with respect to this Court's decision on MDEQ's Motion for Summary Disposition, therefore, this Court should grant Plaintiffs' Motion for Reconsideration.

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[8] This assertion is confirmed by the fact that the legislative history with respect to MCL 24.245c makes no mention of *Charitable Gaming* and the statute does not appear, on its face, to overrule the decision.

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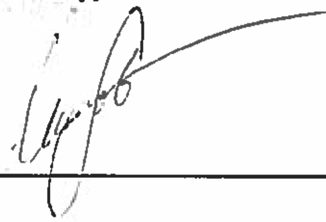
Dated: August 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2019, I served a copy of the above document in this matter on all attorneys of record via email:



Alma Sobo

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